

LAW OFFICE OF STEPHEN G. FRYE
Stephen G. Frye (CSBN 196728)
316 West Second St., Suite 1202
Los Angeles, California 90012
Telephone: (213) 621-1600
Facsimile: (213) 621-1644
Email: sgf@sgfryelaw.com

Attorney for RICHARD LEONARD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

United States of America,	) CR 05-316-DSF
)
Plaintiff.	) SECOND SUPPLEMENTAL SENTENCING
	) POSITION MEMORANDUM OF
vs.	) DEFENDANT RICHARD LEONARD
	) REGARDING RESTITUTION
RICHARD LEONARD)
	) Date: N/A
Defendant.	) Time: N/A
	) Place: Hon. Dale S. Fischer
	) Courtroom 840
	) U.S. District Court
	) 255 East Temple Street
	) Los Angeles, CA 90012
)
)

MEMORANDUM

Defendant RICHARD LEONARD ("Mr. Leonard") respectfully urges the Court to decline to order restitution, beyond the amounts conceded by Mr. Leonard that he owes. The government did not prove by a preponderance of the evidence, the amount of tax loss it claims was caused by Mr. Leonard.

At the restitution hearing the government did not sufficiently prove an accurate restitution amount. Because of the incompleteness of the records relied upon by the government,

1 the government likely will never sufficiently prove an accurate
2 restitution amount. Moreover, Mr. Leonard lacks access to those
3 who could assist him in rebutting the government's assessment, so
4 he has had no meaningful opportunity to rebut the government's
5 claims. Proof of a sufficiently accurate amount would complicate
6 or prolong sentencing to a degree that the need to provide
7 restitution to the government is outweighed by the burden on the
8 sentencing process. Thus, Mr. Leonard urges the Court not to
9 impose an order of restitution beyond that admitted by Mr.
10 Leonard that he owes.

11 Additionally, Mr. Leonard should not be liable for the taxes
12 allegedly owed by any co-conspirator. Each of the taxpayers
13 whose tax liabilities the government is attempting to collect
14 from Mr. Leonard as restitution are co-defendants in this case.
15 Thus, each is represented by counsel and unavailable for Mr.
16 Leonard to interview regarding the accuracy of the IRS's
17 calculations. Mr. Leonard also has been denied access to others
18 who could shed light on the deposit items of co-conspirators that
19 the IRS designates as income. Mr. Leonard has had no meaningful
20 opportunity to rebut the government's claims.

21 Finally, with regard to the taxes assessed by the IRS
22 against Mr. Leonard personally, the government should deduct from
23 this amount taxes paid by his children on the amounts they
24 received. Mr. Leonard should not be obligated to pay taxes on
25 these amounts. His children received the money and were
26 obligated to pay the taxes, which least one of them apparently
27 did.

28

I.

FACTS

A. The Restitution Hearing.

On January 11, 2010, the Court conducted a Restitution Hearing. The primary witness was Revenue Agent Jean Pugh Ostrowski ("Agent Pugh"). Agent Pugh testified that she had prepared an IRS Form 4549-A, commonly known as the Revenue Agent's Report, for tax years 1999, 2000, 2001, and 2002, for Mr. Leonard and his wife, as well as for defendants Victor Preston, Michael Putnam, William Nurick, Marlyn Hinders, David Johnson, and John Lipton. (Transcript of Restitution Hearing, attached hereto as Exhibit A, at p. 10, line 13 - p. 11, line 6; p. 75, line 19 et seq.). Essentially, the Forms 4549-A constitute the IRS's calculation of what it believes a taxpayer owes in taxes for a particular year. (Id. at p. 10, lines 17-24). Agent Pugh testified that she prepared the 4549-A Forms without input from Mr. Leonard or the other taxpayers. (Id. at p. 11, lines 7-9; see also Id. at p. 75, lines 19-23).

Agent Pugh testified that she used a modified bank deposit method of calculating the taxes allegedly owed on the Forms 4549-A. (Id. at p. 63, line 18 - p. 64, line 6). Under this method, the IRS obtains the taxpayer's bank statements and all items of deposit and the deposit slips. (Id. at p. 64, lines 8-13). The IRS needs the deposit items and deposit slips to verify which items of deposit constitute income. (Id. at p. 64, line 14 - p. 65, line 8). For example, if a taxpayer deposited a paycheck and a gift check into his account at the same time, the paycheck

1 constitutes income to the taxpayer whereas the gift check does
2 not. (Id.).

3 In Mr. Leonard's case, the IRS's tax calculations were made
4 primarily from a bank summary (the "Bank Summary") produced by
5 Banco Interfin, a Central American bank, for the account of
6 Abetos del Bosque Lliuvioso, S.A. ("Abetos"), and admitted as
7 Defense Exhibit A-1, bated stamped pages 404-409. (Id. at p. 20,
8 lines 14-20). The Bank Summary was not a bank statement and did
9 not include deposit slips or deposit items. (See Id. at p. 20,
10 line 22 - p. 21, line 2). In fact, the Bank Summary did not even
11 "total the proper deposits." (Id. at p. 30, lines 2-3).

12 The Bank Summary was in Spanish; Agent Pugh admitted that
13 she does not speak Spanish, although she did obtain translations
14 for some of the entries. (Id. at p. 21, lines 7-9). Agent Pugh
15 never discussed with anyone at Banco Interfin how properly to
16 read the Bank Summary. (Id. at lines 5-6; p. 40, lines 9-11).

17 Costa Rican attorney Arnoldo Tinoco Andre ("Mr. Tinoco")
18 created Abetos. (See Id. at p. 24, line 25 - p. 25, line 10).
19 Although most of the deposits identified on the Bank Summary were
20 made by Mr. Tinoco or at his direction, Agent Pugh never
21 discussed any entry with Mr. Tinoco. (Id. at p. 27, lines 15-
22 19). In fact, Agent Pugh never talked to Mr. Tinoco at all, even
23 though he appears on the government's witness list as a trial
24 witness. (Id.). She also never spoke to Teresa Vogt or to Jay
25 Lashlee, both of whom made deposits attributed as income to Mr.
26 Leonard and both of whom have agreed to cooperate with the
27 government. (See Id. at p. 32, lines 5-25).
28

1 Agent Pugh testified that she attempted to corroborate
2 entries on the Bank Summary with as much documentation as
3 possible. (Id. at p. 24, lines 17-18). Even without any
4 documentation, however, all items appearing on the Bank Summary
5 were deemed income to Mr. Leonard. (See Id. at p. 37, lines 10-
6 17).

7 Agent Pugh testified that she also attributed as income to
8 Mr. Leonard deposits made to accounts the IRS believed to be
9 controlled by Mr. Leonard's children. Agent Pugh admitted that
10 the government generally cannot collect the same tax more than
11 once. (Id. at p. 70, lines 2-5). Even though Mr. Leonard's son
12 Paul paid taxes on the money he received, Agent Pugh nevertheless
13 assessed taxes against Mr. Leonard for amounts received by Paul
14 Leonard. Agent Pugh apparently reasoned that, because Mr.
15 Leonard's funds allegedly generated the money to his son Paul,
16 Mr. Leonard was liable to pay the tax, even though Paul had
17 already paid it. (Id. at p. 71, lines 21-23).

18 With regard to the other defendants, the alleged tax
19 liabilities of whom the government seeks to collect from Mr.
20 Leonard as restitution, Agent Pugh testified that the IRS had
21 better documentation of deposit items because many of the bank
22 accounts examined were U.S. accounts. (See Id. at p. 76, lines
23 1-5). Agent Pugh, however, never discussed the deposit items
24 with the taxpayer, Mr. Tinoco, Ms. Vogt, Mr. Lashlee or anyone
25 else who created the deposit items or understood what the deposit
26 items represented. (See Id. at 6-9).

27 **B. Amounts that Mr. Leonard Concedes He Owes.**
28

1 In paragraph 19 of the factual basis to the plea agreement,
2 Mr. Leonard admitted that, aided and abetted by co-conspirator
3 Jay Lashlee, Mr. Leonard "used an account at Paine Weber UBS in
4 the name of Ortega Management Trust to deposit Genesis Fund
5 income." In the government's calculation of Mr. Leonard's 1999
6 taxes, the government included \$10,000 deposited from the Genesis
7 Fund to Ortega Management Trust as taxable income to Mr. Leonard.
8 (See Exhibit B to Sentencing Position Memorandum of Defendant
9 Richard Leonard Regarding Restitution Filed Under Seal). Mr.
10 Leonard concedes that he owes taxes, plus penalties and interest,
11 on this amount.

12 Mr. Leonard concedes that he and his wife used credit cards
13 supported by the Abestos account to purchase various items for
14 their use. Mr. and Mrs. Leonard controlled these cards and the
15 items purchased with the cards inured to their exclusive benefit.
16 This income should have been reported to the IRS, and Mr. Leonard
17 owes back taxes on these amounts. Exhibit B, attached hereto,
18 includes all income amounts on which Mr. Leonard concedes he owes
19 taxes, plus penalties and interest, including credit card
20 purchases during tax years 2003 and 2004 for which the government
21 is not seeking restitution.

22 II.

23 ARGUMENT

24 In paragraph 9 of the Plea Agreement, Mr. Leonard agreed to
25 make restitution for the losses caused by his activities. Mr.
26 Leonard, however, did not agree to a specific amount of
27 restitution. The government bears the burden of proving the
28 restitution amount by a preponderance of the evidence. United

1 States v. Follet, 269 F.3d 996, 1002 (9th Cir. 2001). The Court,
2 however, may decline to order restitution when "determining
3 complex issues of fact related to the cause or amount of the
4 victim's losses would complicate or prolong the sentencing
5 process to a degree that the need to provide restitution to any
6 victim is outweighed by the burden on the sentencing process."
7 18 U.S.C. §3663A(c)(3)(B). The government did not, cannot, and
8 can never sufficiently prove an accurate restitution amount, and
9 proof of a sufficiently accurate amount would complicate or
10 prolong sentencing to a degree that the need to provide
11 restitution to the government is outweighed by the burden on the
12 sentencing process. Thus, Mr. Leonard urges the Court not to
13 impose an order of restitution beyond that admitted by Mr.
14 Leonard that he owes.

15 **A. The Court Should Reject the Government's Attempt to Collect**
16 **Taxes from Mr. Leonard by Designating as Income all Entries on**
17 **the Bank Summary.**

18 The government cannot meet its burden of proof by relying on
19 the Bank Statement. Agent Pugh admitted that the Bank Summary
20 was not a bank statement and did not include deposit slips or
21 deposit items. She testified that deposit items and deposit
22 slips are necessary in order to determine which items in a
23 deposit entry constitute income and which ones do not. In fact,
24 she admitted that the Bank Summary did not even "total the proper
25 deposits."

26 Agent Pugh testified that she attempted to corroborate
27 entries on the Bank Summary with as much documentation as
28 possible. Even without any documentation, however, all items

1 appearing on the Bank Summary were deemed income to Mr. Leonard.
2 The Bank Summary was in Spanish. Agent Pugh does not speak
3 Spanish. Agent Pugh never discussed with anyone at Banco
4 Interfin how properly to read the Bank Summary. She never
5 discussed any entry on the Bank Summary with Mr. Tinoco, with Ms.
6 Vogt, with Mr. Lashlee, or with Mr. Leonard. The Court should
7 reject the government's attempt to collect taxes from Mr. Leonard
8 by designating as income all entries on the Bank Summary. The
9 government has not and cannot meet its burden of proof by relying
10 on the Bank Statement.

11 A defendant must be given notice and the opportunity to
12 speak regarding restitution. United States v. Rice, 38 F.3d
13 1536, 1546 (9th Cir. 1994). The opportunity to speak, however,
14 must be meaningful. As noted by Mr. Leonard in his previous
15 restitution filings, Mr. Leonard has been denied access to Mr.
16 Tinoco, who created the accounts the deposits of which the
17 government deems income to Mr. Leonard. He has also been denied
18 access to Ms. Vogt, who is a co-defendant in this case. Thus, he
19 cannot assess the accuracy of the government's claims that all
20 entries on the Bank Summary constitute income to Mr. Leonard. It
21 is unfair impose restitution on Mr. Leonard based on information
22 that he has insufficient opportunity to rebut. The government
23 has not and cannot meet its burden of proof by relying on the
24 Bank Statement.

25 **B. The Court Should not Order Restitution for Taxes Allegedly**
26 **Owed by Mr. Leonard's Co-Conspirators Because Mr. Leonard has had**
27 **Insufficient Opportunity to Assess the Accuracy of the IRS's Tax**
28 **Assessments for these Co-Conspirators.**

1 Each of the taxpayers whose tax liabilities the government
2 is attempting to collect from Mr. Leonard as restitution are co-
3 defendants in this case. Thus, each is represented by counsel
4 and unavailable for Mr. Leonard to interview regarding the
5 accuracy of the IRS's calculations. Moreover, Mr. Leonard has
6 been denied access to Mr. Tinoco and to Ms. Vogt, each of whom
7 could shed light on the deposit items of co-conspirators that the
8 IRS designates as income.

9 Without access to these taxpayers, and without access to Mr.
10 Tinoco and Ms. Vogt, neither Mr. Leonard nor the Court can fully
11 assess the accuracy of the government's calculations. It is
12 unfair to impose restitution on Mr. Leonard based on information
13 that he has insufficient opportunity to rebut. Because Mr.
14 Leonard has no meaningful opportunity to speak regarding
15 restitution based on the tax liability of co-conspirators, the
16 Court should not order restitution for taxes allegedly owed by
17 these individuals.

18 **C. The Court Should not Order Restitution for Taxes Allegedly**
19 **Owed on Funds Provided to Mr. Leonard's Children.**

20 The government seeks to collect taxes from Mr. Leonard on
21 \$122,245.51 allegedly received from the Genesis Fund and paid to
22 Mr. Leonard's children. As argued in his previous restitution
23 filings, Mr. Leonard should not be obligated to pay taxes on
24 amounts received by his children. His children received the
25 money and should have been obligated to pay the taxes, which at
26 least Paul Leonard apparently did. Paul Leonard testified that
27 he reported on his 2001 and 2002 tax returns the Genesis Fund
28 payments that he received.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 633 West Fifth St., Suite 2800, Los Angeles, California 90071

On March 1, 2010, I served **SENTENCING POSITION MEMORANDUM OF DEFENDANT RICHARD LEONARD REGARDING RESTITUTION FILED UNDER SEAL** by serving same on the U.S. Probation Officer by electronic mail:

USPO Michael Barrett
United States Probation Office
312 North Spring Street
Los Angeles, CA 90012
Fax: 213-894-3627

☒ **(FEDERAL)** I declare that I am employed in the offices of a member of this Court at whose direction the service was made.

Executed on March 1, 2010, at Los Angeles, California.

Stephen G. Frye
PRINT NAME

/s/
SIGNATURE